UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

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In the Matter of:

DPH HOLDINGS CORP., et al.,

Reorganized Debtors.

- -x

United States Bankruptcy Court

300 Quarropas Street

White Plains, New York

February 18, 2011

10:11 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Hearing re: Proposed Forty-First Claims Hearing Agenda

Hearing re: Proposed Sixty-Third Omnibus Hearing Agenda

Transcribed by: Hana Copperman

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P R O C E E D I N G S

THE COURT: Please be seated. Okay. DPH Holdings.

MR. LYONS: Good morning, Your Honor. John Lyons on behalf of DPH Holdings Corp and affiliated reorganized debtors. Your Honor, we have a sixty-third omnibus hearing and forty-first claims hearing. All the matters in the claims hearing have been either adjourned or resolved, so there need be no time spent on the claims agenda. And there is only one matter that is currently before Your Honor in the omnibus hearing, and that is the motion filed by the Ohio Bureau of Workers' Compensation for leave to file a late claim, and, Your Honor, I'll turn it over to them unless you have any questions to me.

THE COURT: No, that's fine.

MR. SKAPOF: Good morning, Your Honor. Marc Skapof from Baker Hostetler for the Ohio Workers' Compensation Bureau.

THE COURT: Right.

MR. SKAPOF: And I also have my colleague here, Elyssa Kates from Baker Hostetler.

Your Honor, we're here this morning on the motion of BWC to have its claim for workers' comp assessment, that's claim number 1294, allowed, whether it's deemed allowed or an amended claim or for the Bureau to be permitted to file a late filed claim under Rule 9006, as construed by Pioneer. I think the legal and factual predicates are set out in our pleadings, and so I'm not going to repeat myself and I'll try to be brief

here. I think some areas to focus on are what's not in dispute in this matter before we get on.

As a preliminary matter, it was the debtors' argument that the claim that Ohio has, albeit they're arguing that it's time barred, is an admin claim, and by definition an admin claim means that BWC provided valuable post-petition services to the debtor. So as we sit here today we're in a situation where the debtor concedes that services were provided by BWC but it doesn't want to pay for them. So, in effect, the estate has been unjustly enriched, because it got services which allowed it to stay in business and consummate a sale, and today we're not getting paid for those.

THE COURT: Well, I guess that's the case for at least as long as they were in business, but they're disputing the amount of it, and they're, basically, saying there's a gate keeping issue, which is whether it's late or not, so we don't really have to get into the merits of the claim.

MR. SKAPOF: Fair enough, Your Honor. Right. I mean, that goes to the liquidation of the claim, the amount, if, indeed, there is a claim.

THE COURT: Okay.

MR. SKAPOF: But I think when you look to the facts and how this was teed up, especially the timeline here, it weighs heavily in favor of allowing the claim.

As a preliminary matter the debtors, in their paper,

say that the Bureau was eighteen months late in filing its motion to seek to have its administrative claim recognized, whether under a Pioneer theory or other ones. The Bureau would take the position that, in fact, the motion was filed six weeks after this Court determined for the very first time, on December 16th, 2010, that the claim was, in fact, one for an administrative claim. So it's a little specious to argue it's a year and a half late when, in fact, it's only six weeks late.

THE COURT: Well, let me -- I mean, I think -- let me cut to the chase here. I think that the difference between the parties on the facts is that Ohio states, and, in fact, I'm just, I'm quoting from the motion at paragraph 31, quote

"The amended claim stems from the same assessments for the same injuries that form the factual basis for the claim", i.e. the claim that was actually filed on December 27, 2005. And the debtors say that's not true, that, in fact, the 2005 proof of claim doesn't refer at all to the assessments that would be coming due thereafter.

MR. SKAPOF: I agree, Your Honor, and I think this goes back to a little bit about the substance of Ohio law and the Bureau's position at the time. Now, the assessments based on your December 16th determination are the injury that gives rise to the claim, because those assessments come due post-petition, and that was the basis for the Court's determination on the 16th. It was Ohio's position, and it still is as a

matter of fact if not a matter of law for purposes of a claim at this point, that those post-petition assessments that are coming due relate back to servicing pre-petition obligations.

THE COURT: But how would you know that when you looked at this claim? I mean, it's for -- I agree with you, the fact that it says premiums as opposed to assessments isn't, ultimately, I think, a problem for Ohio, but it looks as if, from the claim, it's for assessments that, at the latest, come due, if you look at the attachment to the claim, January 1, 2005.

MR. SKAPOF: No. You know, the claim says what it says, Your Honor. I wasn't there when it was --

THE COURT: But, I mean, that's the, I mean --

MR. SKAPOF: Yes.

THE COURT: But, I mean, I think that's the --

MR. SKAPOF: The gist of it.

THE COURT: The point is that anyone looking at this claim thinks oh, well, this is for assessments that we owed up through January 1, 2005, and, in fact, I think they objected originally on the basis that they were paid.

MR. SKAPOF: That's correct, Your Honor. Two points on that. I mean, one, anybody looking at the claim, I understand the point that you're making, but here you have a business that was doing business in Ohio, that is intimately familiar with the workers' comp regime, so, concededly, if the

claim was inartfully phrased, the debtor was on notice, or the pre-petition debtor was on notice at the time and, certainly, thereafter of its obligations. And I think those are implied. They're not expressly stated in the Human Capital order, where the debtor thought authority under the necessity doctrine to basically take care of all its pre-petition obligations, and at the time Ohio would have conceived of the post-petition accruing assessments as, in effect, taking care of those pre-petition obligations.

THE COURT: But once the administrative claims bar date is set isn't it incumbent upon Ohio, then, to file a claim for its accruing post-petition assessments?

MR. SKAPOF: Well, again, Your Honor, Ohio believed its claim was one for pre-petition, and whenever the assessments arose they related back to pre-petition injuries. You know, it sort of said --

THE COURT: But it doesn't say that. It doesn't say, for example, that this includes any future assessments in an unliquidated amount, you know, to be determined as they arise. I mean, it doesn't put you on notice on that at all.

MR. SKAPOF: I mean, as I said, I mean, the claim says what it says, and I'm not going to dispute people's interpretation over it, but on the debtors' view you're sort of setting a rule here that in order for creditors to be a hundred percent protected they need to file claims or at least reserve

rights for any conceivable later bar date in the case. And I don't think that's the rule.

THE COURT: Well, no. I mean, that's only if they missed the bar date. I mean, they could have raised the claim before. Afterwards, too.

MR. SKAPOF: Clearly, but --

THE COURT: And I don't think I'm setting the rule here. I mean, there are a lot of cases that I think are right on point. The Alliance Operating Corporation case.

MR. SKAPOF: Right. But, Your Honor, I mean you're speaking of having the claim amended, correct?

THE COURT: Right.

MR. SKAPOF: Okay. So, I mean, I think in this instance, and I accept your point and what those cases say, but I think the facts are a little more unique in this one, because the issue of whether it was an administrative claim or not wasn't raised by the debtor until well after the administrative claims bar date had passed. So, in effect, Ohio was also relying on the debtor, which, when they initially objected said no, it's a general unsecured claim. They actually initially argued it was a lower priority claim that was filed and only filed their objection as to the classification of the claim that it was for post-petition injuries after the admin bar date, and I don't think it should be the rule, then, that it's incumbent upon the creditor to guess if the debtor is going to

object, especially after a bar date, as to the classification of the claim, that it's actually admin, when they took the position before that it was general unsecured.

THE COURT: But I don't see how that deals with the case law, where either insurers or states themselves filed claims that, on their face, covered and asserted pre-petition claims for these types of assessments or the underlying reimbursements, and then they realized that the law was different, and they sought to amend, and the Courts, I think, have uniformly said you can't do that.

MR. SKAPOF: I mean, that may be the case. Again, we would say that the facts are a little different. But, in any event, you know, that goes to amending the claim under --

THE COURT: Right.

MR. SKAPOF: -- Rule 3001. You know, the -- alternatively, we had been seeking relief either as a deemed claim -- I think, for what I'm hearing Your Honor say, that you'd apply the same analysis to that.

THE COURT: Well, certainly as a deemed claim, because on its face it just doesn't --

MR. SKAPOF: It doesn't say it.

THE COURT: -- doesn't say it.

MR. SKAPOF: Right. And, so, that leads us into Pioneer.

THE COURT: Right.

MR. SKAPOF: And here, I think, the equities that I've been mentioning do cut in favor. As an initial matter, again, the determination that it was, in fact, an admin claim was not made until December 16th. I think we'll all agree with that. And at the December 16th hearing there was a disagreement of the parties as to what the controlling law was and how that established the basis of the claim, and Your Honor chose not to follow Belden Locker for the reasons stated on the record and, instead, went with a series of Ninth Circuit cases and made that. And then Your Honor dismissed the claim, but with leave, in fact, to be here again today --

THE COURT: Right.

MR. SKAPOF: -- to argue excusable neglect.

THE COURT: But can I go back? As far as being misled is concerned, I guess the problem I'm having with the Pioneer argument, to the extent it's based on the notion that, quote, "everyone assumed until November or December, 2010 that this was not an admin claim". I think that just misstates the facts, because this isn't an admin claim. That's the problem. I mean, no one was assuming it was an admin claim, because it isn't an admin claim. It's a claim that ends at January 1, 2005. So I don't see how anyone was misled. I mean, the notion that this claim itself, the proof of claim is an admin claim, I think, is a real stretch. I think what the debtors were actually saying is that all that they owed as of the date

of the hearing would be administrative expenses, but there was no claim ever filed for those. It's not that the December 27, 2005 claim would have been an admin claim, because it doesn't say anything about it.

MR. SKAPOF: Your Honor --

THE COURT: Or indicating that it would be an admin claim.

MR. SKAPOF: Okay.

THE COURT: I mean, I would under -- let me just go one step further. I would understand if the box that was checked said it was an unsecured priority claim, which it did, and then it went further, though, and added that, which it doesn't do, that it's liquidated in the amount of 24,732,628 dollars, which is what it does say, and then says in addition it's unliquidated for amounts accruing in subsequent years, based on pre-bankruptcy events or pre-bankruptcy calculations.

I think, and I think the debtors acknowledge this in their response, if the claim did that it would be a much harder case for them to argue against a) amendment and, also, b) against your Pioneer motion, because then you're just talking about a difference between 507(a)(8) and 507(a)(2). And, you know, everyone's pretty much on notice that they're hundred cent claims, and it's just the theory, as opposed to the facts, but here the facts just don't assert a post-petition claim.

I mean, every -- not just the label, but the facts

themselves. Everything stops on January 1, 2005, and most of the stuff goes back to 2002, and it doesn't say anything about future assessments that might be unpaid. So I just, I think the notion that no one thought of "this" as an admin, you know, I'm putting quotes around this, I don't think -- I think that's -- the debtor certainly didn't, because it didn't give them any indication that they should. So it seems to me what Ohio is doing now is trying to say that although it didn't assert a claim in the face of the administrative bar date for those post-petition amounts that it should be allowed to have it even though it is, in fact, twelve months later.

MR. SKAPOF: Right. I mean, Your Honor, just there's one clarification, at least, or amplification. There is one line on the attachment to the proof of claim that does have an entry for October, 2005. I mean, the parties can --

THE COURT: Where? Which one? Where? Is the attachment more than one page?

MS. KATES: No.

MR. SKAPOF: No, Your Honor.

THE COURT: Where is the October?

MR. LYONS: It's the third group, Your Honor, the last entry. The third group of entries, that very last entry, under, right next to "guarantee fund high", in the amount of 253,000 and change. It's at October 17, 2005.

THE COURT: I don't see it. Here. You want to just

mark it on here for me, or maybe I have a different attachment?

(Pause)

MR. SKAPOF: May I approach?

THE COURT: Yes.

MR. SKAPOF: You know --

THE COURT: Okay. I see it now. I see it.

MR. SKAPOF: But, again, going to Your Honor, you know, that is in the attachment, albeit it's one line in the attachment, but, again, you know, this is a debtor that's intimately familiar with the workers' comp regime, so they can't necessarily act as if they're surprised. And, then, I would just, again, according to this timeline the claim was filed in December '05. The first objection is not raised until December 6, 2010. Excuse me. The first one is June 22, 2009, and it's not till --

THE COURT: Right.

MR. SKAPOF: -- 2010, ten days before the hearing, that they even raise this issue as to classification. So, you know, in terms of a laches type argument, the Bureau is out there, and they're not getting --

THE COURT: But can I --

MR. SKAPOF: -- it objected to.

THE COURT: But, again, I don't -- I think all of that history is explained by the fact that they were actually thinking of this as a pre-petition claim, not as an admin

claim, for pre-petition assessments, which they paid. And, I mean, that's what we went through at the start of the hearing. I was confused, too, because I asked your colleague and Mr. Lyons what are you guys fighting about at this point. What is unpaid? And, in fact, the answer was assessments for 2009 and going forward, so they certainly wouldn't have objected in 2005, 6 or 7 over unpaid assessments from 2009, and I think anyone dealing with this is basically saying did you pay your assessments for the pre-petition three years. And I think that explains the delay in the debtors objecting to this and bringing it to a head. It wasn't that pressing an issue for them, because they, you know, it's a pre-petition claims.

And I think the argument about it being an admin claim is in response to, I'm assuming, that they asked the same question that I asked at the start of the hearing, which is what is Ohio really claiming for at this point, because we paid. So I just don't, I mean, I think the burden's really on Ohio to file the admin claim.

Now, I know that the argument is that we thought by having filed this claim we did file an admin claim, but it really doesn't seem to indicate that anywhere to me.

MR. SKAPOF: I mean, I guess, just as the -- I mean, I see where Your Honor is going on this.

THE COURT: Well, I mean, I --

MR. SKAPOF: I don't think, I mean, I'd like to argue

the equities, because I think if you get past the hurdle of excusable neglect I think a lot of them, or most of them, cut on our side. I'm seeing Your Honor's very hesitant to go beyond whether there is excusable neglect and you're focused on the substance and the face of the claim. I can't change --

THE COURT: Well, I'm also focused --

MR. SKAPOF: -- what the claim says or doesn't say.

THE COURT: I mean, I'm focused on the equity.

MR. SKAPOF: Yes.

THE COURT: Am I?

MR. SKAPOF: Yes.

THE COURT: I am focused also on the equities, because if, you know, again, if people were, essentially, on notice of this, and that's to your argument, that the debtor really was, sort of, laying in the weeds until the administrative claims bar date passed, and, I guess, I mean, that is, I think that's relevant to the Pioneer analysis if that's what they were doing, but it just seems to me they were just in a totally different field or forest or wherever. They weren't in the same weeds, because they were looking at this as a, you know, as what it, I think, purports to be.

MR. SKAPOF: I mean, I, again, I don't --

THE COURT: No, I understand that --

MR. SKAPOF: I don't want to waste anybody's time here, just --

THE COURT: I understand the confusion point, and I think that it is, I mean, there are -- I don't think this is a case where the law necessarily changed. I mean, I think there are a lot of cases that deal with the issue of when these types of excise tax claims really arise, and, you know, they go back pretty far. They go back to the nineties, at least, and they were, I think, current fairly close to the time that this case was filed in 2005, so it's not -- I don't think this is a case where the law really changed, and, therefore, you could be justified in filing a claim thinking that it was pre-petition.

MR. SKAPOF: And I understand what Your Honor is saying, but, I guess, under, sort of, a Pioneer standard, and people can use their factors for whether it's excusable or not, I mean, in some instances there's no claim filed at any bar date, and then a creditor shows up and says oh, by the way, I have a claim, and here is my reason for why I missed the bar date, and if the Court accepts that as excusable neglect it then goes on to the equity. So, you know, the Court seems focused today on the notice prong of the face of the claim, which concededly goes to an amendment or deemed claim, but I don't think it's a necessary analysis to make when looking at a late filed claim. So our view would be we were told on December 16th, and given leave that this was, in fact, an admin claim, which the debtor agreed with. I mean, they're the ones that pressed that argument. And six weeks later we file a

motion based on us learning this for the first time, and we ask to have that claim recognized, and, as our papers say, there's no prejudice to the debtor in this. In fact, I think they should almost be estopped from claiming prejudice, because they're the ones that agreed it should be a hundred cents claim. We came in and argued it should be an unsecured claim. So they shouldn't then be able to use the, sort of, gotcha of no, actually we think it's a different kind of claim, and it's actually worth more money, but you're late. There's going to be no floodgates of litigation here or people running in. I mean, I think we can pretty much agree that this is, sort of, unique on its facts. I don't think there are going to be similar circumstances. This late in the case I don't think there are going to be admin claimants that pop out of the woods filing a bunch of claims under the fact that they thought they had a pre-petition claim. I mean, if they missed the bar date because they were providing services post-petition and that's all they were doing, I think that's a very different case than this one.

And, you know, just to amplify that, again, I think, under, at least as I would read Pioneer, there's no requirement to look at a previously filed claim and whether that was defective, because Pioneer is based on the fact that you're filing a new claim.

THE COURT: No, I know. I'm just looking at it as for

the reason why it wasn't filed as an admin claim from the beginning. And the reason given is that Ohio thought that it wasn't an admin claim.

MR. SKAPOF: Agreed, Your Honor. I mean, clearly our position would be look, Ohio, in retrospect, in hindsight, made a mistake, as construed by the Supreme Court that inadvertence or --

THE COURT: Right.

MR. SKAPOF: -- you know, that, and we say that. I mean, we're falling on that --

THE COURT: Right.

MR. SKAPOF: -- because we need the Court to recognize that, in fact --

THE COURT: Right.

MR. SKAPOF: -- we made a mistake that rises to the level of excusable neglect before we can move on and discuss the equities, but --

THE COURT: Right. And I understand that it wasn't a -- taking on its face the assertion that it did make a mistake and think that it wasn't an admin claim, because it's based upon pre-bankruptcy injuries. The assessment, the calculation of the assessment is based on pre-bankruptcy injuries.

The other thing that you have that's appealing to your side is that the mistake was one that was not in your favor.

It's one thing to make a mistake that would have asserted an admin claim, but this one asserted a lower priority claim.

On the other hand, I, kind of, have to question whether it was entirely a mistake, since it's clear that the assessments are based not only on pre-petition but also on post-petition injuries and, certainly, for, I mean, I can't imagine that there were no workers' comp claims from October of 2005 forward. So --

MR. SKAPOF: Agreed, Your Honor, but --

THE COURT: So that wasn't based on a mistaken view of the law. That was just error, right? They just forgot to file the claim.

MR. SKAPOF: I mean, I guess, Your Honor, I mean, and the debtor can disagree with this and you can read the assertion now, I would say that once they were operating in a post-petition regime, you know, in order to be in business they have to operate under the aegis of the Workers' Compensation Bureau's rules, and those are, in effect, ordinary course claims, and the future assessments arising from post-petition injuries, the debtor was paying those post-petition injury claims in the ordinary course, would have to recognize them, and --

THE COURT: No, but you still have the assessment issue.

MR. SKAPOF: -- the assessment's attached to them.

THE COURT: I mean, you still have the assessment issue. Those are still separate from the reimbursement claims, so I don't really -- I guess I don't follow that argument.

MR. SKAPOF: Okay. And, I guess, just, for purposes of this argument going, I think Your Honor's indicated that it's a quasi-mistake, charitably.

THE COURT: Well, I mean, I --

MR. SKAPOF: From Your -- I mean, I guess so. I --

THE COURT: I just have some skepticism that someone actually really did this legal analysis. I think that people got the bar date for unsecured claims. They realized that there was probably something owing that you could assert a 507(a) claim for and filed this, and then they got the bar date for the admin claims and didn't do anything.

I mean, I think it's -- I'm not sure that you've really convinced me that this was, in fact, some sort of reasoned legal analysis that led to not filing the admin claim. And, of course, that leaves aside the cases that say that reasoned legal analyses aren't an excuse. I'm not sure Pioneer goes that far, but I'm not sure there was any reasoned legal analysis.

MR. SKAPOF: Okay. Right. And, I think, as to Your Honor second's point, I think the cases where they say you know, sort of, mistake of law, doesn't rise to the level, I think if you look, and even in the parentheticals that the

debtor has and in others, they sort of say whether it was a known and clear rule --

THE COURT: Right.

MR. SKAPOF: -- or it was unambiguous.

THE COURT: No, I --

MR. SKAPOF: I think here, if we could get over the hurdle of whether it was a mistake to begin with, again, I would think, on the merits, clearly we weren't dealing with an area of settled law, because there was a dispute as to that, and there was a contested hearing on it, and people debated cases, and it's not a bright-line rule, clearly. I think most people in this room would also concede that. But, you know, for purposes of just this hearing, and I see I'm not totally convincing you, which is the first thing that I need to do, so I don't, really, necessarily, think other than the arguments in our papers and our colloquy now, that, you know, I can't change the face of the proof of claim, and if Your Honor's going to focus on that there was really a post-petition piece there, then, you know, no, the Bureau didn't reserve their rights on that, and if it's not apparent to the Court, at least, that they put them on notice, you know, I don't know where --

THE COURT: Okay.

MR. SKAPOF: Excuse me for a second, Your Honor.

THE COURT: Okay. All right. Well, I mean, I don't think that the debtor really misled you all. That's what I was

focusing on --

MR. SKAPOF: Okay.

THE COURT: -- the proof of claim as far as the Pioneer analysis goes.

MR. SKAPOF: Okay. So I mean, that's --

THE COURT: They didn't lull you into a false sense that you were covered by -- on your admin claim --

MR. SKAPOF: Okay.

THE COURT: -- in other words.

MR. SKAPOF: So accepting that, that still leaves under Pioneer, whether it was stayed, which again, we would concede, especially in hindsight, we made, gets to the level of excusable neglect.

THE COURT: Right.

MR. SKAPOF: If Your Honor doesn't think that, then I think I should sit down, basically. Because we don't get to the next stage of the analysis. You know, I'm sort of looking for a little guidance here. Because if you're not going to be convinced --

THE COURT: Well --

MR. SKAPOF: -- then you're not convinced.

THE COURT: -- I mean, how do you overcome the fact that there was no administrative proof of claim filed, even for assessments premised upon post-petition injuries?

MR. SKAPOF: I don't have an explanation for that,

because, you know, I mean, I wasn't even involved --

THE COURT: Right.

MR. SKAPOF: -- in the case at the time. The Bureau filed this claim in the ordinary course of how they prosecute their claims and their litigation. And, you know, it turns out they were wrong.

THE COURT: Okay. All right.

MR. SKAPOF: But my colleague is indicating that, I think, and the debtor would have confirmed this debt, in fact, we were getting paid for post-petition assessments during the case, which then would lead to the fact that the debtor would be on notice, in fact, that it had a continuing obligation --

THE COURT: Well, but --

MR. SKAPOF: -- under Ohio law.

THE COURT: -- debtors pay admin claims all the time post-petition. But here, very clearly, there was a change in circumstances from a case where the stock was trading at a substantial premium. The debtor was on the verge of administrative insolvency. And, you know, with the changes in the financial market and with GM's imminent bankruptcy filing and Chrysler's bankruptcy filing, knowing what the administrative claims were, because they might not get paid if they were too high, became a really important thing. That's why -- I mean that's, I think, why the administrative claims bar date was set. It's not -- you don't have one in every

case, obviously, every Chapter 11 case. So, I mean, that's the explanation for that.

MR. SKAPOF: I guess we don't really have anything else to say on this --

THE COURT: Okay.

MR. SKAPOF: -- other than also, you know, again, I don't think this is a claim that came out of the woodwork or a creditor that does, because, again, this was a condition to doing business in Ohio. Delphi had been in Ohio for a long time. It knows what it's Workers' Comp obligations are. It couldn't -- you know, outside of bankruptcy, if it went in and said well, I forgot I needed to pay these assessments, I mean --

THE COURT: Right.

MR. SKAPOF: -- that argument's just not going to fly.

THE COURT: Right.

MR. SKAPOF: So --

THE COURT: Although the cases say it doesn't matter. The bar date still puts the onus on the claimant to file the proof of claim. Okay.

MR. SKAPOF: Thank you, Your Honor.

THE COURT: Thank you. Did the debtors have anything more to say?

MR. LYONS: Your Honor, just very briefly. I mean, just to confirm Your Court's statements that, you know, we did

nothing in any way to mislead Ohio. I think that's clear. The record shows that. And we objected to the claim on the basis it was paid. Simple as that. The arguments regarding post-petition assessments really came in response to the Belden Locker argument. And that's where we addressed that.

Just one other item and then I'll sit down. You know, just also to turn the Court's attention to the modification procedures, paragraph 39. I think we actually went the extra mile. We said, if you have a proof of claim you can only rely on it -- and it clearly and unambiguously states it's for an administrative expense. So, you know, if you're Ohio and you get the bar date and you look at the bar date language and you look at the claim that you filed, the light should have gone on, and it didn't.

And I think, Your Honor, we don't even get to excusable neglect. I think what we've heard so far could underpin a finding that there was actually a conscious decision not to file a claim, albeit based upon a mistake of law or a wrong interpretation. But it may not even get to excusable neglect in our view. And that's all I have, Your Honor.

THE COURT: Okay. All right. I have a motion before me by the Ohio Bureau of Workers' Compensation to seek -- or to obtain three alternative forms of relief. The first would be to deem a claim timely filed, or alternatively, two, to authorize the amendment of the claim, or three, to permit a

late filed claim. The successor to Delphi Corporation and its affiliated debtors, DPH Holdings Corporation, under Delphi's Chapter 11 plan, has objected to the motion.

The motion is premised or refers to a claim that the Ohio Bureau filed in Delphi's case on December 27, 2005, in response to -- actually well before the first bar date set in this Chapter 11 case, which was a bar date for pre-petition claims. That is claim number 1294. The claim asserts an unsecured priority claim of $24,732,628.02 under Section 507(a)(8) of the Bankruptcy Code, for, on the face of the claim, the debtors' statutory obligation to pay Workers' Compensation premiums, pursuant to Ohio Revised Code Section 4123.35.

This is not the first time that the Court has dealt with this proof of claim. The debtors objected to the claim, and the Court held a hearing on it on December 16, 2010, at which it became clear -- and this was not disputed by the debtors -- that the claim is one for assessments calculated by the Ohio Bureau based on the prior years' experience of the debtor of dealing with Workers' Compensation claims. And those assessments are the cost of running the self-insured program by the Ohio Bureau.

The debtors' objection to the claim asserted that the debtors had paid all of the pre-bankruptcy assessments, including those that would have been owing for the three years

before the bankruptcy petition date. And in fact, it was acknowledged by the Bureau at the December 16th hearing that the remaining claim that Ohio had was for assessments for 2009 and thereafter.

I ruled at the December 16th hearing that claim number 1294 did not set forth a claim for those assessments, but rather set forth a claim for assessments accrued pre-petition; on the theory espoused by the debtors that first they had paid all pre-petition assessments, the claim would be denied with regard to anything owing before 2009, and secondly that the 2009 and thereafter assessments were not asserted in the proof of claim and did constitute separate post-petition claims determined and coming due each year under the Ohio statute, based on, among other cases, the theory set forth in In re Blue Coal Corporation, 166 B.R. 816 (Bankr. M.D.Pa. 1993) and In re Giley, 288 B.R. 901 (Bankr. M.D.Fla. 2002).

My ruling was expressly without prejudice to the Ohio Bureau's right to seek to file a late administrative claim for 2009 and thereafter or to seek related relief, which is what Ohio has done in the present motion before me. I've reviewed that motion and heard oral argument and I've determined that the motion should not be granted.

The first argument by the Bureau is that claim 1294 should be treated as a timely filed administrative claim and that the box checked as "unsecured priority claim" should be

ignored and I should treat the claim, as based on its facts, as setting forth an administrative claim. The claim itself is relied upon as the basis for the assertion that it should be treated as a timely claim, apparently under the theory of -- or the doctrine by which courts have permitted informal proofs of claim to be treated as proofs of claim.

That theory requires that the claim have been filed with the bankruptcy court and had to have become part of the judicial record, that it states the existence and nature of the debt, that it states the amount of the claim against the estate, and finally, fourth, evidences the creditor's attempt to hold the debtor liable for the debt. See In re Enron Creditors' Recovery Corporation 370 B.R. 90, 99 (Bankr. S.D.N.Y. 2007) as well as In re Houbigant Inc., 190 B.R. 185, 187 (Bankr. S.D.N.Y. 1995).

The problem with that assertion here is that the proof of claim as filed does not state the nature of the debt or the amount of the claim against the estate. That is because the claim, to the extent that Ohio now wants it to be treated as an administrative claim, not only does not say it's an administrative claim, but it also does not set forth sufficient facts from the face of the claim to give those who would be reviewing the court docket reasonable notice that the claim is asserted for assessments accruing in subsequent years. Instead it contains no reservation of that type of claim, nor does it

state that the specific dollar amount, down to the last two cents, is the liquidated portion of the claim and that there is an unliquidated portion for amounts that would be accruing in subsequent years, based on pre-petition Workers' Compensation claims being factored into the Bureau's subsequent annual assessments. And, in fact, the attachment to the claim, which references specific dates going back to 2001 and up to the day before the petition date, gives every indication that it is referring simply to calculations for the three years prior to the bankruptcy case, which is the standard for -- at least under the case law that recognizes these types of assessments -- as fitting within 507(a)(8) of the Code, the period that is covered by that section. So I do not believe that the proof of claim that was filed can be treated as an informal proof of administrative expense claim.

Next, the Bureau seeks to obtain an order permitting it to amend claim number 1294 to include the necessary averments that would give parties notice that it was asserting an administrative expense claim for the 2009 and thereafter years. It is well settled that the decision to permit an amendment of a proof of claim rests with the sound discretion of the bankruptcy judge. In re McLean Industries Inc., 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990).

Generally, amendments to claims are freely allowed when, "The purpose is to cure a defect in the claim as

originally filed, to describe the claim with greater particularity, or to plead a new theory of recovery on the facts set forth in the original complaint or claim,"Midland Cogeneration Venture Limited Partnership v. Enron Corporation, 419 F.3d 115, 133 (2d Cir. 2005).

The Court must, however, "subject post-bar date amendments to careful scrutiny, to assure that there was no attempt to file a new claim under the guise of an amendment," id., thereby circumventing the bar date. Here the amendment very clearly would be post-bar date, because this Court established two separate administrative expense bar dates in this case and they ran approximately fourteen months before the motion was made.

The post-bar date -- the fact that the Court must pay close scrutiny to post-bar date requests to amend, is highlighted in particular in a situation where the movant seeks to amend in a way that enhances the priority of the claim or that would turn the claim from being an unsecured to a secured claim. See In re Alliance Operating Corp. 60 F.3d 1174 (5th Cir. 1995), as well as In re Big Rivers Electric Corp. 1998 U.S. Dist. LEXIS 23011 (W.D.Ky. September 25, 1998).

A determination of whether an amendment to a proof of claim is permissible requires a two-step inquiry. First, courts examine "whether there was a timely assertion of a similar claim or demand evidencing the intention to hold the

estate liable." Midland Cogeneration 419 F.3d at 133. The test for permitting an amendment to a claim in this respect is largely the same as the test governing an amendment to a pleading under Rule 15(c) of the Federal Rules of Civil Procedure. In re Asia Global Crossing Limited, 324 B.R. 503, 508 (Bankr. S.D.N.Y. 2005). That is, "The Court must decide whether there is a sufficient commonality of facts between the allegations relating to the two causes of action to preclude the claim of unfair surprise," i.e., the claim relates back to the original pleading where there is a sufficient commonality of facts. Id.

In addition, the Court should consider whether the defendant had notice of the claim now being asserted and whether the plaintiff would rely on the same type of evidence to prove both claims. Id. Thus, consistent with Rule 15(c), an amendment that simply raises an alternative legal theory is not improper if it relies on facts already in the claim. See In re Integrated Resources Inc., 157 B.R. 66, 71 (S.D.N.Y. 1993). If the amendment does relate back to the timely filed claim, courts have then proceeded to the second step of the analysis, which is an equitable consideration of the particular facts of the case to determine whether it would be equitable to allow the amendment. Midland Cogeneration 419 F.3d at 133. Multiple factors are considered under this second prong of the analysis, including: 1) whether there was undue prejudice to the

opposing party; 2) whether there was bad faith or dilatory behavior on behalf of the claimant; 3) whether other creditors would receive a windfall were the amendment not allowed; 4) whether other claimants might be harmed or prejudiced; and 5) the justification for the inability to file the amendment at the time the original claim was filed. Id. See also In re McLean Industries Inc., 121 B.R. 704, 708 (Bankr. S.D.N.Y. 1990).

As the Midland court stated, the most important consideration is whether the opposing party will be unduly prejudiced. Id. Further, that analysis -- that second prong of the analysis, closely resembles the excusable neglect analysis under Bankruptcy Rule 9006(b) and the Supreme Court's Pioneer decision. Id.

Here, I believe the objection to the motion is correct that the motion fails the first prong of the analysis; that is, it would not properly relate back to the -- the amendment, I'm sorry, would not properly relate back to the original proof of claim as filed, in essence for the same reasons that the original proof of claim cannot be deemed a timely informal proof of claim for the administrative expense that's now being asserted by Ohio. The amendment would: a) change the priority from 507(a)(8) to administrative expense status under 507(a)(2). Moreover, it would be based upon new evidence which is the debtors' Workers' Comp experience in the years preceding

the dates of the unpaid assessments. That would be starting in the year 2008 and thereafter, since Ohio's calculation is based on that experience.

In similar circumstances, and, in fact, almost directly on point circumstances, the courts have been clear that such amendments should not be permitted in the face of an intervening bar date. See In re Alliance Operating Corp., 60 F.3d 1174 (5th Cir. 1995), and In re Lions of California Inc. 2005 Bankr. LEXIS 3292, at pages 10 through 11 (Bank. S.D. Cal. July 26, 2005). See also In re Big Rivers Electric Corp., 1998 U.S. Distr. LEXIS 23011 (W.D. Ky. September 25, 1998), as well as In re Walls & All Inc., 127 B.R. 115 (W.D.Pa. 1991) and In re Metro Transportation Co., 117 B.R. 143 (Bankr. E.D.Pa. 1990).

That should end the inquiry with regard to whether an amendment should be permitted here. But I will note also that in weighing the equitable factors to consider, I believe that the balance tips in favor of DPH and its creditors. This is not merely because the amount of hundred-cent claims would increase if I permitted the claim to be amended, and if it was subsequently sustained on the merits, since a mere increase in dollar amount, I believe, is not sufficient to prejudice the debtor and other creditors.

Rather, I believe, here, the equitable factors that weigh in favor of the denial of this request are as follows.

First, the claim itself, on its face, I believe is one that gives no indication that it's asserting claims for post-petition periods. I would note that the function of a claims bar date, particularly an administrative claims bar date in this case, is not only for the benefit of the debtor to calculate the claims asserted against it, but also for the benefit of creditors.

Here, the creditors that were particularly focused on the administrative claims bar date and the administrative claims that would be asserted in light of that bar date, were the DIP lender group and those who would be funding the debtors' belated exit from Chapter 11. As I've noted in prior hearings, the record of this case is clear that with the collapse of the auto industry and the Chapter 11 case of Chrysler and the imminent Chapter 11 case of GM, as well as the collapse of normal banking relationships, there was a very real possibility that Delphi's case had become administratively insolvent and it would, therefore, not have the necessary cash to emerge from Chapter 11 at the time that the administrative claims bar date was set.

Therefore, getting a proper tally of administrative expense claims was critical to the debtors' emergence from Chapter 11, and the DIP lenders' and others' willingness to fund that emergence. I believe that to the extent they would have reviewed this proof of claim, they would not have reached

the conclusion that Ohio -- the Ohio Bureau was, in this proof of claim, setting forth sufficient facts to assert that they had, in addition, administrative expense liability for 2009 and thereafter. See, again, In re Lions of California Inc., 2005 Bankr. LEXIS 3292 at page 11, which talks about the reliance on a proof of claim by third parties.

I have, in light of the importance of the administrative claims bar date, over the last couple of years, disallowed late-filed administrative claims, and I believe that it would be unfair to those creditors, as well as the creditors who filed timely proofs of claim, to permit this claim to be amended to assert a late admin claim, and would, I believe, lead such creditors whose claims were not allowed to be filed late to seek reconsideration under Section 502(j). So it appears to me that there would be prejudice to third parties here.

I also believe that while the Bureau has asserted that it believed in good faith that it had asserted a claim that would never be an administrative claim, because its view of the law was that the claim would be treated as a pre-petition claim, there are two problems with that assertion as far as the equitable analysis for an amendment request goes, as well as for the Pioneer analysis, which I'm about to undergo.

First, it is clear, based upon the cases that the debtors and I have cited, that the issue of when a 507(a)(8)

claim like this accrues or an administrative claim for such assessment accrues, has -- or was current as an issue well before December 27, 2005, when the claim was filed, and that the majority of cases and the analysis supporting them argued that the claim accrued each year when the assessment is made and then not paid, as opposed to during the years when the data making up the calculation originated. The contrary approach is a distinct minority approach, and, in fact, apparently as far as Ohio has stated, was limited to a case issued after the claim was filed although before the administrative claims bar date, in an unreported decision, In re the Belden Locker Company, 2008 W.L. 762243 (Bankr. N.D. Ohio March 21, 2008).

Therefore, it appears to me that while I may not go so far as the debtors to say that a legal mistake is never an excuse for a late claim or a basis for arguing that the equities are in favor of the claimant, I don't believe that this legal mistake was one that was so clearly justifiable as to merit taking the chance of not filing an administrative claim before the bar date for such claims.

Secondly, the facts undercut the argument that Ohio has made that the claim was not filed as an administrative claim solely because of this legal mistake. Ohio acknowledges, as it must, that the data informing the 2009 and thereafter assessments includes Workers' Comp claims that would have been filed post-petition, and, therefore, under its mistaken theory

of why the claim would fall on either the pre- or post-petition side, that portion, based upon post-petition or post-bankruptcy assessments, would clearly be an administrative claim. And, therefore, there would be no excuse for not filing an administrative claim based on its mistaken legal theory insofar as the assessments were based on those calculations, which means that, in fact, Ohio was at least in some measure simply dilatory as opposed to mistaken in not filing an administrative expense claim by the administrative expense claim bar date.

So, for that alternative reason, I would deny the motion to file an amended claim that would set forth the facts supporting Ohio's administrative expense claim.

Finally, Ohio has sought permission to file a claim late or an administrative expense claim late, under Bankruptcy Rule 9006(b), which permits a claimant to file a late proof of claim if the failure to submit a timely proof of claim was due to excusable neglect. I have held in this case, and that holding is supported by the case law, that a court's administrative expense bar date is equally subject to Section 9006(b) and the case law analysis of it. That case law for my purposes is driven by two decisions. First, Pioneer Investments Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993), as well as the Midland Cogeneration case that I previously cited, 419 F.3d 115.

The burden of proving excusable neglect is on the

claimant seeking to extend the bar date, In re R.H. Macy & Co., 161 B.R. 355, 360 (Bankr. S.D.N.Y. 1993). The test is a two-step one here, as well. First, the movant must show that its failure to file a timely claim constituted neglect as opposed to willfulness or a knowing omission, neglect generally being attributed to a movant's inadvertence, mistake or carelessness. Id. at 387-88 -- I'm sorry, Pioneer 507 U.S. 387-88.

After establishing neglect, as opposed to willfulness or a knowledge of the bar date and the failure to show any unknowing basis for neglecting it, the movant must show by a preponderance of the evidence that the neglect was excusable. And that analysis is to be undertaken on a case-by-case basis on the particular facts before the Court, although the Court is to be guided by, and make the determination balancing, the following factors: a) the danger of prejudice to the debtor; b) the length of the delay and whether or not it would impact the case; c) the reason for the delay, in particular whether the delay was within the control of the movant; and d) whether the movant acted in good faith (Id. at 395).

The Second Circuit, in the Midland case, has held however, that, "Inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute excusable neglect." 419 F.3d 126. Indeed, the Second Circuit said in that case, "We've taken a hard line in applying the Pioneer test. In a typical case, three of the Pioneer factors,

the length of the delay, the danger of prejudice and the movant's good faith, usually weigh in favor of the party seeking the extension. We've noted, though, that we and other circuits have focused on the third factor, the reason for the delay, including whether it was within the reasonable control of the movant, and we caution that the equities will rarely if ever favor a party who fails to follow the clear dictates of a court rule, and that where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test." Id. at 366 -- I'm sorry, Id. at 122-123. See also In re Musicland Holding Corporation, 2006 Bankr. LEXIS 3315 at pages 10-11 (Bankr. S.D.N.Y. 2006).

Before turning to the test, it should be noted that "The bar date serves the important purpose of enabling the parties-in-interest to ascertain with reasonable promptness the identity of those making claims against the estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization, " In re Calpine Corp., 2007 U.S. Dist. LEXIS 86514 at pages 14-15 (S.D.N.Y. November 21, 2007). Therefore, the bar date is not simply a procedural gauntlet or trap but plays an extremely important role in negotiating the debtor's emergence from Chapter 11, including not only informing the debtor's analysis but that of important third-party constituents in the case. In re Drexel Burnham

Lambert Group Inc., 148 B.R. 1002, 1008-10 (Bankr. S.D.N.Y. 1993).

This is particularly the case in allowing late filed claims after a plan is confirmed, which subjects the debtor and third parties potentially to prejudice and skewing the premises upon which they agreed upon the debtor's plan. Id.

Here, as I've said, the Court has serious doubts as to whether the neglect here was legitimately outside of Ohio's reasonable control. As I noted during oral argument, I think that Ohio was mistaken in asserting that it was led on or confused by the debtors' response to the proof of claim that was filed into thinking that it had legitimately protected itself. I believe, to the contrary, that it was the debtor and its constituents who would have been legitimately confused by the proof of claim that was filed, which, on its face, asserted a pre-petition claim and made no mention of amounts that would be accruing for post-bankruptcy years.

Further, as I've said, I believe that the majority of the case law, and clearly the better reasoned case law, would have put the Bureau on notice that the claims for accruing assessments, at least for the period while the debtor was doing business post-bankruptcy, would more properly be viewed as administrative claims and therefore be subject to the administrative claims bar date.

Therefore, as I said during oral argument, I don't

believe that the debtor was laying in the weeds to trap Ohio by asserting after the administrative claims bar date that, in fact, the claims it had were administrative claims. In fact, I think that the claims that were asserted in the proof of claim, as I've already stated, were not administrative claims but were pre-petition claims. It was only the non-filed claims that still remained and were still to be dealt with, on December 16, 2010 at the prior hearing, that would be of an administrative expense nature. And so I believe that there was no legitimate confusion caused by the debtor in the Bureau's mind as to whether those claims should have been separately filed after the -- I mean, before the administrative claims bar date.

So it appears to me here that this is not a case of neglect as opposed to a conscious decision. But assuming for the sake of argument that the Bureau would get over the neglect hurdle, I don't believe it is excusable here, first because of the fact that it was within the control of the claimant to file the claim properly. Certainly there was a legitimate basis for asserting an administrative expense claim. And as I've noted earlier, even under Ohio's theory of when the claim accrued, with regard to those aspects of the assessment that were based upon post-petition Workers' Compensation claims, the only basis for the claim would have been as an administrative claim. And yet Ohio didn't file the administrative expense claim timely. So, generally speaking, if there was neglect here, I don't

believe that it was neglect that was outside of the reasonable control of the Bureau.

Secondly, I believe the proper analysis of the delay here should be not starting from December 16th as Ohio -- of 2010 -- as Ohio asserts, but from the date of the actual notice of the administrative claims bar date. Therefore, the delay in asserting an administrative expense claim is here over a year, which courts, including the Midland court, have recognized to be undue delay. Moreover, that delay straddled the confirmation of the plan, and as I have stated before, calculation of administrative expenses was an important element of whether the plan would actually be confirmed and go effective as modified. So here I believe that the delay was both undue in terms of just its basic length as well as the relevance of the delay to the facts of the case itself.

While I believe that Ohio acted in good faith, I also believe that there is a risk of prejudice here, as I've already discussed in the context of the request to amend the proof of claim with regard to the debtors and other creditors. And I won't repeat that discussion again.

So, in weighing the Pioneer factors, I conclude that the claim should not be permitted to be filed late. So, to the extent that the -- either one of the two administrative claims bar dates entered by me in this case would pertain to Ohio's -- the Ohio Bureau's outstanding and claimed administrative

expenses, those expenses would be barred and the claims therefore would be disallowed. And the debtors should submit an order consistent with that ruling.

MR. LYONS: We will, Your Honor. That's the only item we have for today, unless Your Honor has any questions.

THE COURT: No.

MR. LYONS: That's fine. Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 11:35 AM)

I N D E X

RULINGS

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C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a true and accurate record of the proceedings.

Hana Copperman

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